In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 332

DAVID BRUCE MOSKOWITZ, PETITIONER

v.

J. WINSTON KINDT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner was a full-time student at Franklin & Marshall College and as such received a II-S (student) deferment from his local draft board. In January 1967 he was requested to withdraw from school because of low grades. He then applied to Temple University, but was told that he could not be accepted as a full-time student until he demonstrated his ability to make higher grades. He was admitted, however, as a part-time student with the understanding that if he passed his courses with a B average he could enroll as a full-time student in September 1967.

Under the statute and regulations, a II-S student deferment requires the registrant to pursue a "full-time course of instruction." (P.L. 90-40, 81 Stat. 102, amending 50 U.S.C. App. 456(h)(1); 32 C.F.R. 1622.25(a)). Accordingly, when petitioner's local draft board learned that he was no longer a full-time student at Franklin & Marshall, it reclassified him, in March 1967, as I-A-O.[1] Petitioner asserts that he then went to his local board, told the clerk of his arrangement with Temple, and asked to file an appeal. He states that the clerk and the government appeal agent told him that he should not appeal, but should wait until he became a full-time student at Temple, and then seek reclassification as II-S.

On July 24, 1967, petitioner was ordered to report for induction as a non-combatant on August 15. On August 7, he was accepted as a full-time student by Temple University for the term beginning September 1967. He then brought this action seeking a declaratory judgment and an injunction against his induction. He alleged, among other things, that the advice of the clerk and the appeal agent resulted in a denial of due process. The district court dismissed the complaint for lack of jurisdiction (Pet. App. 17-22), and the court of appeals affirmed (Pet. App. 23-27).[2] Pe-

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[1] I-A-O is the classification for conscientious objectors available for non-combatant military service (see 32 C.F.R. 1622.11). This had been petitioner's classification before he entered Franklin & Marshall College.

[2] In addition to referring to the impropriety of petitioner's injunctive action under P.L. 90-40, 81 Stat. 104, amending 50 U.S.C. App. 460(b)(3) (Pet. App. 26), the court of appeals noted that it was "unable to conclude that there is no basis in

titioner's induction has been stayed pending completion of this litigation.

1. The courts below correctly held that they had no jurisdiction to review petitioner's classification prior to his induction. P.L. 90-40, amending 50 U.S.C. App. 460(b)(3) provides that "[n]o judicial review shall be made of the classification or processing of any registrant by local boards * * * except as a defense to a criminal prosecution * * * after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work * * *." The considerations being urged in *Oestereich* v. *Selective Service System Local Board No. 11*, No. 46, this Term, in which certiorari was granted on May 20, 1968, for avoiding this jurisdictional bar are not pertinent here. Since no suppression of free speech is alleged here, pre-induction judicial review cannot be sought as necessary to prevent a possible chilling effect on First Amendment rights.[3] Nor is any claim made here that

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fact" for petitioner's reclassification as I-A-O after his withdrawal from Franklin & Marshall (*id.* at 25), and also mentioned his failure to exhaust administrative remedies by not appealing his classification (*id.* at 25-26).

[3] The petitioner in *Oestereich*, who turned in his draft card and was reclassified as a delinquent and ordered inducted, claims that the purpose of the reclassification was to punish him for an action protected by the First Amendment, and that under *Dombrowski* v. *Pfister*, 380 U.S. 479, prompt judicial review is necessary to protect his First Amendment rights. *Wolff* v. *Selective Service Local Board No. 16*, 372 F. 2d 817 (C.A. 2), on which petitioner here relies (Pet. 14-16), similarly involved a reclassification allegedly resulting from the exercise of First Amendment rights (see Pet. App. 26-27), al-

petitioner is entitled to a statutory exemption from military training and service.[4] Finally, petitioner cannot maintain that he was in any respect subjected to an allegedly "punitive" reclassification. Instead, this is simply a routine Selective Service case of the type which the statute was clearly designed to cover.

2. Moreover, on the merits there is no basis for overturning petitioner's Selective Service classification. On March 17, 1967, when petitioner was reclassified I-A-O, he was not a full-time college student and thus was not entitled to a student deferment (see P.L. 90-40, amending 50 U.S.C. App. 456(h)(1); 32 C.F.R. 1622.25(a)). Accordingly, the clerk of the local board and the appeal agent correctly advised him that there was no basis for appeal. Nor was petitioner a full-time student when, on July 24, 1967, he received the order to report for induction that is challenged here. The fact that he later became a full-time student, in September 1967, did not relieve him from the obligation to comply with that order; the order was not subject to rescission because petitioner subsequently became a full-time student again (see 32 C.F.R. 1625.2; compare 32 C.F.R. 1625.3(b)).

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beit there, unlike in *Oestereich*, it was unclear that there had been any violation of Selective Service regulations at all. *Wolff* is thus wholly inapposite.

[4] In *Oestereich* the registrant was concededly entitled to the unconditional statutory exemption for ministers and ministerial students (see 50 U.S.C. App. 456(g)). Here petitioner's only claim is to a student deferment (see P. L. 90-40, amending 50 U.S.C. App. 456 (h)). Nor is his right to such deferment by any means conceded.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1968.

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